UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

COLUMBIA COLLEGE CHICAGO

and

Cases: 13-CA-073486
13-CA-073487
13-CA-076794
13-CA-078080
13-CA-081162
13-CA-084369

PART-TIME FACULTY ASSOCIATION AT COLUMBIA COLLEGE CHICAGO – ILLINOIS EDUCATION ASSOCIATION/NATIONAL EDUCATION ASSOCIATION

COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS AND BRIEF IN SUPPORT THEREOF TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE

Now comes Daniel E. Murphy, Counsel for the Acting General Counsel, pursuant to Section 102.46 of the Board's Rules and Regulations, to take exception to the following portions of the Decision of Administrative Law Judge Geoffrey Carter in Columbia College Chicago[1] dated March 15, 2013.

EXCEPTIONS

1. That portion of the ALJ's decision in which the ALJ found that the Respondent did not change the scope of the bargaining unit by limiting their bargaining

[1] Hereinafter the National Labor Relations Act will be referred to as the "Act"; the National Labor Relations Board is the "Board"; the Administrative Law Judge is the "ALJ"; citations to the ALJ's decision are referred to as "ALJD__"; the Acting General Counsel's Exhibits are referred to as "GC__"; Respondent's Exhibits are referred to as "R__"; Charging Party's Exhibits are referred to as "CP__"; and the citations to the transcript are referred to as "Tr. __".

obligation and grievance processing to a bargaining unit consisting solely of part-time facility that are currently teaching for the Respondent. ALJD p. 56, lines 42-44.

2. That portion of the ALJ's decision in which the ALJ found that the scope of the ULPs committed by the Respondent did not warrant the restoration of the mutually agreeable bargaining schedule utilized by the parties prior to the advent of the Respondent's retributive bargaining conduct. ALJD p. 80, lines 31-32.

BRIEF IN SUPPORT OF THE EXCEPTIONS

I. Background

Respondent Columbia College Chicago is private college providing arts and media educational services to undergraduate and graduate students in Chicago Illinois. The Respondent has around 12,000 students and utilizes about 1200 adjunct facility to teach approximately 75% of the classes offered by the College. Since March 1998, the Part-Time Facility Association at Columbia College Chicago ("Union" or "P-fac"), has represented a bargaining unit of part time facility. At all material times, the parties have been negotiating a successor agreement to the 2006-2010 collective-bargaining agreement. As correctly determined by the ALJ in the instant proceeding, as well as determined in the ALJD in *Columbia College Chicago,* JD(ATL)-17-12 (GC-7), the Respondent committed a variety of unfair labor practices against P-fac in retaliation for the Union's attempt to bargain for improvements in the terms and conditions of employment of the adjunct facility, and P-fac's attempt to monitor compliance with the existing contract through information requests and grievances. ALJD p. 70-72.

In the face of the Union's attempt to improve or, more accurately, regain its collective voice over operational matters that impact on the unit's terms and conditions of employment, the Respondent instituted a retributive bargaining strategy designed to impede the bargaining process and punish the Union for engaging in protected concerted activity. As properly determined by the ALJ, the Respondent, both at and away from the bargaining table, engaged in a course of overall bad faith bargaining with the "intent to frustrate the possibility of reaching any agreement" with P-fac. ALJD p. 75 lines 35-36.

II. ARGUMENT

A. The Administrative Law Judge Erroneously Determined that the Respondent did not Unilaterally Change the Scope of the Bargaining Unit. (Exception #1)

Amidst the ALJ's detailed and proper determination that the Respondent engaged in overall bad faith bargaining, Counsel for the Acting General Counsel submits that the ALJ failed to properly find that the Respondent unlawfully changed the scope of the bargaining unit when it decided in spring 2012 that the unit only included currently employed adjunct professors. GC-53 p. 1. [...P-fac members do not have any expectation of continued employment nor do they have any status as employees until and unless the College chooses to rehire them."]

Respondent's stated position that it only recognized an obligation to bargain over the terms and conditions of currently employed adjunct professors runs counter to the bargaining unit certified by the Board as well as the current contractual unit. GC-2(a);

R-2. This issue arose from Respondent's interpretation and application of the so-called Harvey Nathan arbitration award. In that award the arbitrator ruled against the Union in a just-cause discharge grievance. In doing so, the arbitrator found that the evidence before him showed that:

> The parties in composing the Agreement carefully established that an adjunct, or part-time, instructor is employed only when he or she is teaching a course during a finite period of time. Between teaching assignments the adjunct has no status as an employee. He or she is hired solely for the period of time

GCX-50, p. 10. The arbitrator narrowly applied this finding to the singular issue before him, specifically, that the just cause provision of the contract was meant to be applied solely to part-time professors who were teaching a class at the time the disputed discipline occurred. The Respondent, on the other hand, seized upon this language and unilaterally determined that its overall bargaining obligation arose solely in the context of terms and conditions of adjuncts that were currently employed during any one semester. That is to say, the Respondent would no longer be required to recognize part-time faculty as bargaining unit employees in between semester teaching assignments, and, most importantly, Respondent did not have the statutory obligation to bargain with the Union over the future changes in terms and conditions of employment of part-time faculty members. Tr. 1130-1131.

The Respondent's stated rationale behind this position stems from its belief that part-time faculty members have no expectation of recall and are nothing more than 'applicants' for employment every semester they teach. Thus, according to

Respondent's interpretation of the arbitration award, prior to the assignment of a class by the Respondent, a part-time faculty member has no standing as an employee within the meaning of the Act. As repeatedly noted by the Respondent:

> ...Columbia's changes to curriculum, including the reduction of credits for a particular course, do not affect the wages or terms and conditions of employment of any P-fac members. Instead, P-fac members are contingent facility, who may or may not be rehired to teach the course and given curriculum that Columbia develops and implements before P-fac members are employed for each academic semester.

GCX- 53, p. 5. Respondent broadly utilized its interpretation of the award to change the scope of the unit and limit its obligation to bargain over the effects of the prioritization process, as well was to limit Respondent's obligation to accept and process grievances. GC-59 [prioritization]; GC-93(a),(b)&(c) [grievance processing]. As noted by Respondent's Counsel in her opening statement at hearing:

> The college's CBA with Pfac is essentially a pre-hire contract. It specifies the terms and conditions for employment for adjuncts when the college elects to employ them. Like most pre-hire contracts, a PFAC member is not covered by the terms of the contract when he or she is not employed by the college.

Tr. 19. In other words, in the face of the Union's demand that Respondent bargain over operational changes affecting the bargaining unit, such as the Prioritization reorganization program or changes in course credit hour assignments, or even grievance processing. Respondent decided to reduce its bargaining obligation by re-defining the bargaining unit itself. According to Respondent's interpretation, since part-time faculty members have no expectation of continued employment with Respondent,

the Union has only the right to bargain with the Respondent over issues impacting employees working during that particular semester.

This position is obviously contrary to established Board law on many levels. Under settled Board law, part-time faculty members are an appropriate unit because that share a substantial and continuing interest in common wages, hours and working conditions. *University of San Francisco*, 265 NLRB 1221 (1982). Under Section 9(a) of the Act the Union has a continuing right under the statute to bargain over terms and conditions of employment even though the bargaining unit is comprised of part-time employees who may or may not be working at any given time. By limiting its recognition of the Union to only those employees who are working during a particular semester, and to subjects of bargaining that occur only during those particular individual semesters, Respondent unilaterally altered the scope of the bargaining unit. As a result of this change, Respondent deprived the now excluded employees of representation to which they are entitled under Section (9) of the Act and also deprived those now-excluded employees from coverage under any collective-bargaining contract eventually negotiated with the Union.

This deprivation of the part-time employees' right to representation under Section 9(a) of the Act between work assignments was clearly demonstrated by the Respondent's conduct in the processing of grievances. Under the terms of the collective bargaining agreement:

> "A grievance is defined as a complaint by a unit member or a group of unit members or the Association (Union) that

> there has been a violation misinterpretation, or misapplication of any provision of this agreement."

R-1, Article IX, Section 1. However, since the Nathan award issue on February 11, 2012, Respondent's definition and understanding of what constituted a "grievance" was drastically curtailed unilaterally insofar as Respondent refused to acknowledge the right of the Union to file grievances over issues arising over any matters involving what Respondent deemed to be "future" employment rights. For example, on July 2, 2012, in answering a set of grievances filed by the Union, the Respondent took the position that:

> Furthermore...Arbitrator Harvey A. Nathan's...Arbitration award states unambiguously that...a unit member is "hired solely for the period of time during which the teaching occurs ... [o]nly an instructor with an "academic year appointment" has continuity of employment beyond a single teaching period." As such, prior to each semester, Arbitrator Nathan stated that a unit member is an "applicant for employment" who has "no standing to question his [or her] future employment." Accordingly, because you (or the Association on behalf of unnamed grievants) are attempting to grieve class assignments for which you applied, you also do not have standing as articulated within the Nathan Award.

GCX-93(e), See also, 93(a),(b)&(c). Simply put, the Respondent no longer recognizes the applicability of the grievance procedure to issues arising beyond the current teaching period or semester. *Id.* Respondent does not recognize that the Union or bargaining unit employees have the right to protest changes in terms and conditions of employment that are scheduled to take effect in future academic semesters because, according to Respondent's misguided and unlawful interpretation of the arbitration award, they do not have any 'standing'. In so doing, Respondent does not recognize

that the bargaining unit contains any employees beyond those current employed during that particular semester. Therefore, Respondent maintains that it has no duty to negotiate or process grievances arising out of changes or issues arising out of future job assignments.

Based on the foregoing, Counsel for the Acting General Counsel submits that the record in the underlying proceeding amply demonstrates that the Respondent improperly limited its bargaining obligation under the Act by unilaterally changing the scope of the bargaining unit in violation of Section 8(a)(5) and (d) of the Act.

B. The Administrative Law Judge Erroneously determined that the Remedial Bargaining Order in this Proceeding did not Require a Time and Reporting Requirement. (Exception #2)

Counsel for the Acting General Counsel submits that the unfair labor practices committed by the Respondent in this matter warrant the establishment of time and reporting requirements as part of the affirmative bargaining order. While pled as a special remedy by the Acting General Counsel, the inclusion of a time and reporting requirement as part of an affirmative bargaining order in this case is consistent with the Board's practice of setting forth requirements beyond its normal remedial measures when warranted by the circumstances. See e.g. *Veritas Health Services, Inc.*, 359 NLRB No. 111 Slip op. at 3 (April 30, 2013). [Board ordered respondent to post, mail, and read the Board notice to assembled employees.] See also, *Beverly Health & Rehab. Servs.*, 325 NLRB 897, 902-03 (1998) [Board extended certification year for six months in order to dispel the effects of bad faith bargaining during the certification year.]

In the instant case, such a special remedy is warranted in light of the ALJ's determination that:

> In...viewing the College's conduct in its totality, I find that the College did engage in overall bad-faith bargaining as alleged in paragraph XII of the complaint. Indeed, by making contract proposals that were retaliatory and that lacked justification, insisting on a management rights clause that would leave PFAC members with substantially fewer rights than they would have under the Act, and engaging in delaying tactics by setting unlawful preconditions to face-to-face bargaining, the College demonstrated an intent to frustrate the possibility of reaching any agreement.

ALJD p. 75 lines 30-36. This unlawful bargaining conduct on the part of the Respondent originated at the highest levels of management and demonstrated a complete rejection of Respondent's statutory obligation to bargain. In so doing, Respondent demonstrated its intent to punish employees for engaging in protected concerted activity. *Quality House of Graphics, Inc.*, 336 NLRB 497, 515 (2001). Coupled with the ALJ's other unfair labor practice findings that the Respondent violated Section 8(a)(5) of the Act[2], there is clearly sufficient evidence to show that the Respondent has a continuing strategy to frustrate and deny bargaining unit employees the right to engage in good faith bargaining free of retaliation and overall bad faith. A Board order providing for a bargaining schedule and a reporting requirement would provide a detailed and specific structure on which to evaluate whether the Respondent is complying with its statutory obligations.

[2] Specifically, by (a) failing and refusing to meet and bargain with PFAC from February 16 to June 13, 2012 regarding a successor collective-bargaining agreement...(b) failing and refusing to bargain with PFAC about the impact and effects of College's implementation of course credit hour reductions in several departments...(c) failing and refusing to respond to PFAC's information requests about the Early Feedback System and the College's investigation of Vallera for misconduct...and (d) unreasonably delaying in responding to PFAC's information request about faculty class assignments for fall 2012. ALJD p. 72-73.

This type of specific targeted remedial order is also particularly appropriate because there is ample evidence in the record to show that the Respondent's retributive bad-faith bargaining strategy is continuing. Specifically, on June 28, 2012, after eight months of evasion and dilatory tactics designed to avoid bargaining with the Union, the Respondent reluctantly decided to meet and seemingly bargain with the Union. GC-33. However, even this faint opening to the Union came with a price and the taint of bad faith. That is, the Respondent decided unilaterally that it would only meet once a month, and only for two hours for all pending bargaining matters between the parties, and not until July 20, 2012. Such conduct itself, is indicative of bad-faith and an independent violation of Section 8(a) (5) of the Act. *Lower Bucks Cooling & Heating*, 316 NLRB 16, 22 (1995) (finding, *inter alia*, employer's limiting the duration of meeting and delaying the scheduling of future meeting indicative of bad-faith bargaining). Respondent's unilaterally established bargaining schedule stands in stark contrast to the weekly meetings held between the parties for years prior to the advent of the Respondent's retributive bargaining strategy conduct beginning in October, 2011. Tr. 52. This Respondent, even in the face of NLRB complaints and litigation, is determined to bargain with P-fac solely on its own terms and its own schedule. While it is axiomatic that the Board cannot compel a party to agree to any particular contract proposal,[3] the Board can certainly order a Respondent prone to continuing bad-faith conduct to bargain pursuant to an established schedule and be required to report the progress of the parties at stated intervals. *All Seasons Climate Control Inc.,* 357 NLRB No. 70 (Slip-op 2011). See also, *Gimrock Construction, Inc.,* 356 NLRB No. 83 (2011)

[3] *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970).

In sum, Section 8(d) of the Act compels parties to a collective bargaining relationship to "meet at reasonable times and confer in good faith..." 29 U.S.C. 158(d). In the context of evaluating bargaining conduct under Section 8(d), the Board has routinely found that a party violates their statutory duty to bargain in good faith by engaging in dilatory delaying tactics and arbitrary scheduling of meetings. *See, Regency Service Carts*, 345 NLRB 671, 716-717 (2005); *See also*, *Calex Corp.*, 322 NLRB 977, 978 (1997). In order to successfully remedy the Respondent's demonstrated propensity to, *inter alia*, engaged dilatory tactics and overall bad faith bargaining, Counsel for the Acting General Counsel submits that a time and reporting requirement as part of the affirmative bargaining order would be particularly effective in re-establishing the *status quo* of meeting on a weekly basis, as established by the parties, prior to the advent of the Respondent's unlawful bargaining campaign. ALJD p 6, lines 17-18. Specifically, the record clearly established that this routine weekly bargaining schedule came to a halt, when the Respondent decided to retaliate against the Union by imposing unlawful conditions on the bargaining process and insist that the Union accept its regressive bargaining proposals. ALJD p. 8 line 38; ALJD p. 74 line 17. As such, it is particularly appropriate to order a time and reporting requirement as part of the affirmative bargaining order in this matter and restore the status quo in place prior to the advent of the Respondent's retributive bargaining conduct.

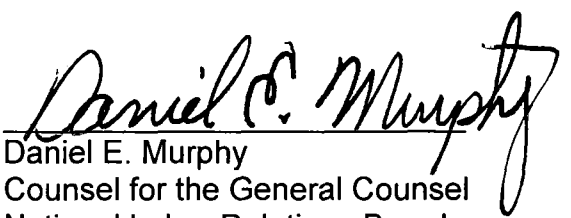
III. CONCLUSION

Based upon the foregoing, Counsel for the Acting General Counsel respectfully requests that the Board find merit to its Exceptions to the Decision of the Administrative

Law Judge and conclude that Respondent unilaterally changed the scope of the bargaining unit in violation of Section 8(a)(5) and 8(d) of the Act. The Acting General Counsel further requests that the Board order the Respondent to bargain according to time and reporting requirements pled in the outstanding amended complaint. Finally, the Acting General Counsel requests that the Board provide an appropriate remedy for all of these violations of the Act found in this proceeding.

Dated at Chicago, Illinois, this 10th day of May, 2013.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **Counsel for the Acting General Counsel's Exceptions and Brief in Support Thereof to the Decision and Recommended Order of the Administrative Law Judge** was electronically filed with the Board's Office of Executive Secretary on May 10, 2013; true and correct copies of that document have been served in the same manner to the parties listed below.

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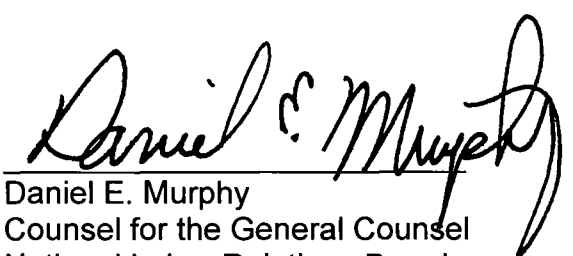

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